United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon-Quality Line Pipe from Korea

EXECUTIVE SUMMARY - SECOND WRITTEN SUBMISSION

I. INTRODUCTION

1. It is well established that the complainant has the burden of presenting a *prima facie* case of noncompliance with the terms of a covered agreement. Korea has not met this burden with respect to either the USITC's serious injury determination of the President of the United States' decision to apply the line pipe safeguard measure.

2. In challenging the USITC's serious injury determination, Korea and the third parties disregard the standard of review applicable to disputes concerning competent authorities' determinations under the Safeguards Agreement ("SGA"). In particular, they ignore the Appellate Body's repeated statements that review of competent authorities' determinations is not to be *de novo* and that panels are not to substitute an alternative view for that of the competent authorities.

II. THE INCREASED IMPORTS REQUIREMENTS OF ARTICLES 2.1 AND 4.2(A) WERE SATISFIED.

3. Neither the SGA nor the panel and Appellate Body decisions in *Argentina-Footwear* specify the precise period that should be examined to determine whether there have been imports "in such increased quantities" as to cause or threaten serious injury. In *Argentina-Footwear* the AB did not view the examination of data for two to three years before imposition of the safeguard measure to be inconsistent with its admonition that the investigation period be "the recent past."

4. The USITC's examination of the sharp and significant increase in imports (on both absolute and relative levels) during the last two full years of the period investigated is entirely consistent with the Safeguards Agreement and with Appellate Body Reports in *Argentina – Footwear* and *United States – Lamb Meat*. Nothing in Korea's arguments negates the fact that there was a recent, sudden, sharp, and significant increase in imports, both in absolute and relative terms. The only way that Korea can possibly claim a decline in imports is by manipulating the comparative time segments and then urging that the comparison most favorable to it is the only permissible approach. There is nothing in the Safeguards Agreement, however, that requires competent authorities to examine exclusively the comparative developments between the two halves of the last twelve months for which data were collected.

5. Korea's arguments that it was mandatory for the USITC to evaluate only developments in the June 1998-June 1999 period, to the exclusion of all other import data and time periods, is contradicted by, not consistent with, the Safeguards Agreement. The USITC followed its long-standing methodology of examining imports on a calendar year basis with additional data

collected for interim periods (in this case the first six months of 1999 and, for comparison purposes, the first six months of 1998). By using the same neutral methodology it routinely uses in its investigations, the USITC assured that its serious injury determination was based on an objective evaluation, as required by Article 4.2(a) of the Safeguards Agreement. Korea's argument that the USITC should have prejudged the data and manipulated its methodology to reach the result Korea prefers would require the United States to act inconsistently with the objectivity requirement of Article 4.2.

6. Examined on the objective basis routinely employed by the United States, imports increased, on an absolute basis, by 67 percent from 1996 to1997, and by an additional 44 percent from 1997 to 1998. Imports relative to U.S. production showed the same sharp increase towards the end of the period of investigation, rising from more than 17.2 percent in 1996, to more than 23.2 percent in 1997, to more than 42 percent in 1998. Relative import levels continued to rise over the interim periods, increasing from more than 36.1 percent in interim 1998 to more than 43.5 percent in interim 1999.

III. THE USITC'S SERIOUS INJURY FINDING FULLY COMPLIES WITH ARTICLES 3 AND 4 OF THE SAFEGUARDS AGREEMENT.

7. Korea's argument that the USITC determination fails to comply with Articles 3 and 4 of the SGA because of "fundamental inconsistencies and contradictions" among the Commissioners misconstrues the requirements of the SGA and exaggerates the extent of any disagreement among the USITC Commissioners. The Safeguards Agreement does not require unanimity when the determination of a competent authority is made by members of a Commission or other body. The views of a Commissioner who is not part of the competent authority for purposes of the relevant determination carry no evidentiary weight and certainly cannot be considered to bolster whatever argument Korea may otherwise make based on record data.

8. Korea greatly exaggerates the extent of any disagreement between the three Commissioners who found serious injury and the two Commissioners who found a threat thereof. The views of a Commissioner who is not part of the competent authority for purposes of the relevant determination should be disregarded by the Panel not only because they are not part of that determination, but because they simply represent an alternative view of the evidence and, therefore, are not entitled to any evidentiary weight.

9. Korea has failed to make a *prima facie* case that the USITC's serious injury determination was in any way distorted by the inclusion of data relating to oil country tubular good ("OCTG") production. First, Korea's contention that the decline in OCTG shipments in 1998 was much more severe than the decline in line pipe shipments is simply not correct. The shipment declines for the two types of pipe in 1998 were almost identical. Second, Korea incorrectly assumes that the largest share of average unit costs consists of fixed costs. Third, the data in the USITC

record contradict Korea's assertion that the line pipe industry's performance was affected by disproportionate declines in the production and sale of OCTG in early 1999. Sales of both line pipe and OCTG were in fact flat or rising in this period.

10. Korea has not demonstrated any inconsistency between the USITC's finding of serious injury and the Safeguard Agreement's definition of "serious injury" as a "significant overall impairment." Korea incorrectly states that the U.S. line pipe industry experienced only a "one-year downturn." The evidence in the record before the USITC showed that the condition of the line pipe industry deteriorated greatly in 1998 and interim 1999. In addition, this "significant impairment" was widespread and comprehensive.

11. There is no merit to Korea's argument that the industry's performance was improving at the end of the period of investigation. The objective and quantifiable data in the USITC record showed a significant deterioration in the condition of the industry from1997 through June 1999 as well as in interim 1999 as compared with interim 1998. Notwithstanding this, Korea presented a collection of fragmentary statements, often taken out of context, designed to show that the industry was improving at the end of the period of investigation, or at later points. In comparison with the actual "hard data" showing a significant overall impairment in the industry, the collection of self-serving fragmentary statements advanced by Korea is unpersuasive.

12. In addition Korea's characterization of the evidence upon which it relies to argue that the industry was improving at the end of the period is flawed. For example, Korea claimed that imports were falling at the end of the period investigated, whereas they were actually increasing in May and June of 1999.

13. The price increase announcements on which Korea relies also do not prove that the industry was no longer in a state of significant overall impairment, for several reasons. There is no evidence in the record that these anticipated price increases by a small number of firms in the industry were actually successful. Moreover, the USITC reasonably found that any such price increases were most likely attributable to an increase in raw material costs due to the imposition of antidumping measures on hot-rolled steel.

IV. THE USITC'S CAUSATION FINDING FULLY COMPLIED WITH ARTICLE 4 OF THE SAFEGUARDS AGREEMENT.

14. Korea incorrectly asserts that there was no coincidence in trends of imports and domestic industry indicators. The SGA does not require an exact and overlapping coincidence between imports trends and serious injury to the domestic industry. It is not necessary for increased imports and a deterioration in the industry's condition to occur simultaneously; in fact, some lag between cause and effect is to be expected.

15. Korea's effort to show that there was no coincidence in trends depends on its result-oriented approach of dividing 1998 into six-month increments. Nothing in the SGA compels or provides for examining data on imports and injury in half-yearly, quarter-yearly or any other increment of time. Instead, Article 4.2 requires that the competent authority reach its determination based on an evaluation of objective evidence. The USITC approach, of adhering to its longstanding practice of making year-to-year comparisons and comparing interim data for the unfinished year to comparable interim data for the previous year, comports with these objectivity requirements. Korea's preferred approach, which would require the USITC to evaluate the evidence based on Korea's results-oriented comparison does not meet these objectivity requirements.

16. Korea's contention would mean that competent authorities can stray, after they have received and examined the relevant data, from their usual procedures and practices to perform prejudged comparisons of part-year data. If that were so, the USITC could just as easily have divided 1998 into quarterly time periods. A comparison by quarters again shows that there is a coincidence between increased imports and the deterioration of the industry. Imports during the third quarter of 1998 were higher than in any other quarter in the entire five-and-a-half year period for which the USITC collected data.

17. Korea is wrong in asserting that the Safeguards Agreement requires competent authorities to consider the impact of other causes in the aggregate. The Safeguards Agreement contains no such requirement, and the Appellate Body has recognized this. Korea's contention that the USITC should have considered all other causes of injury in the aggregate is tantamount to the *Wheat Gluten* panel's insistence that increased imports "alone" must be capable of causing serious injury. That is essentially the analysis of the panel that was rejected by the Appellate Body in its reports in both *Wheat Gluten* and *Lamb Meat*.

18. Korea and the EC have not shown that the impact of "other factors" severed the causal link between increased imports and serious injury, or that the effects of these "other factors" -- insofar as they produced any injurious effects at all -- were attributed to imports.

19. The USITC first found that imports were an important cause of serious injury. It did so by considering the size of the increase in imports (both in actual and relative terms), and the timing of this increase. It also considered the market share held by imports, and information on the pricing of imports and domestic line pipe. It identified imports as a cause of declining prices and concluded that the import-induced price declines resulted in a significant loss of sales, market share and revenues on the part of the domestic industry, as well as declines in other key indicators of industry health such as capacity utilization and employment. In sum, the USITC found that there was a direct, *i.e.*, a "genuine and substantial," causal link between the significant increase in imports and the deterioration of the domestic industry's condition.

20. The USITC then analyzed each "other cause" of injury, both to assess its importance and

to consider whether it detracted from the importance of increased imports as a cause of serious injury. By examining the "other causes" in this manner, the USITC ensured that it did not improperly attribute to imports injurious effects, if any, caused by the other causal factors. The USITC stated that it was not attributing injury caused by other factors to the imports.

21. The USITC distinguished the injurious effects caused by increased imports from the effects of declining demand from the oil and gas sectors in several ways. First, the USITC noted that the domestic industry had operated at lower levels of demand in the past without experiencing the severe financial losses the industry experienced in 1998/1999. Second, the USITC distinguished the injurious effects caused by increased imports from the effects of declining demand from the oil and gas sectors by recognizing the dramatic shift in market share from domestic suppliers to imports. The USITC further distinguished the effects of increased imports from those of the oil and gas crisis by noting the across-the-board price declines in 1998 and interim 1999, even in line pipe grades not sensitive to demand related to the oil and gas industries. Finally, the USITC pointed to a consensus among producers, importers and purchasers that imports played a major role in the decline in U.S. line pipe prices in 1998 and interim 1999. By separately identifying injurious effects of increased imports that were wholly unrelated to the oil and gas market, the USITC ensured that it was not attributing to imports injury caused by the decline in oil and gas demand.

22. The USITC considered competition among domestic producers as another factor potentially causing injury, but found that, since competition among domestic producers had always been a factor in the market, such competition did not explain the sudden and sharp declines in domestic prices and shipments. The USITC also noted that two firms began production of line pipe in 1998. It acknowledged that industry capacity increased, but it found the increase in the 1994 -1998 period (less than 8 percent) to have been considerably less than the growth in consumption (more than 22 percent).

23. Korea's claim that there was a build up of "significant excess capacity" is both exaggerated and unconvincing. Korea focuses on the excess capacity in interim 1999, and claims that it was attributable to a build up in capacity. In fact, excess capacity in interim 1999 was largely due to a sharp drop in consumption, and not to any significant build up of new capacity. Thus, the USITC did not improperly attribute to increased imports injury caused by competition among domestic producers.

24. The USITC found while there was some evidence of domestic producers shifting away from OCTG production to other types of pipe, it did not appear that they switched into line pipe production. Citing to the Appellate Body's decision in *Wheat Gluten*, the EC argues in its third party submission that the USITC should have investigated this factor further, and that it could not have avoided attribution of the effects of this factor without quantifying its exact impact. The EC misconstrues the Appellate Body's analysis in *Wheat Gluten*. While the AB ruled that competent authorities may not limit their examination of "'other factors' to those clearly raised before them

as relevant by interested parties," it also rejected "the European Communities' argument [in that case] that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant."

25. All of the record evidence before the USITC indicated that there was no substantial switch from OCTG to line pipe production. The petitioners stated at the USITC injury hearing that any diversion of production would have been relatively small. They noted that line pipe production declined at the same time as OCTG production. There was no contrary evidence in the record. The USITC Report shows that production of line pipe declined substantially in 1998 and in interim 1999 (as compared with interim 1998), making it implausible that serious injury was caused by overproduction of line pipe resulting from any shift from OCTG production. Under these circumstances, the USITC properly evaluated this factor, and explained its reasonable conclusion that declines in OCTG production were not substantially responsible for the serious injury experienced by the line pipe industry.

26. The USITC also considered allegations that declines in the domestic industry's exports were a more important cause of serious injury than increased imports. It found that although this decline worsened the serious injury caused by the increased imports, the increase in imports was far larger than the decline in exports. Thus, although the modest declines in exports may have affected the producers' bottom line, those effects were not attributed to imports because the impact of the increased imports dwarfed the decline in exports.

27. Contrary to the EC's assertions, the USITC did not "mis-attribute" injurious effects to imports of specialty products. During the USITC's injury investigation, a German line pipe producer argued that there was no domestic production of high frequency induction ("HFI") line pipe over 6 inches in diameter, or any domestically-produced substitute for use of this product in deepwater applications, and asked that HFI line pipe be excluded from the scope of the investigation. The USITC recognized that there was some evidence of customers preferring HFI line pipe, but it was not persuaded that the HFI line pipe was sufficiently different from the domestic product to warrant its exclusion from the domestic like product.

28. Once the USITC properly determined that HFI pipe was part of the domestic like product, imports of HFI pipe were reasonably included in the subject imports considered by the USITC in its analysis of the impact of increased imports on the condition of the domestic industry. Moreover, it should be noted that even if the USITC had excluded HFI imports from its analysis, the ultimate conclusion regarding the impact of increased imports on the U.S. industry would have been no different. Imports from Germany did not represent a significant proportion of total imports, and there is no suggestion that all, or even most, German imports consisted of HFI line pipe.

V. THE UNITED STATES APPLIED THE SAFEGUARD MEASURE ON TERMS CONSISTENT WITH ARTICLES 5 AND 9 OF THE SAFEGUARDS AGREEMENT AND ARTICLES I, XIII, AND XIX OF THE GATT 1994.

A. A TRQ is Not A Quantitative Restriction or Quota Within the Meaning of Article 5 of the Safeguards Agreement or Articles XI and XIII of GATT 1994.

29. Every relevant authority supports the conclusion that tariff rate quotas ("TRQs") are not quantitative restrictions or quotas. The text of Article XI necessitates this conclusion. If TRQs were quantitative restrictions or quotas, they would be prohibited. They plainly are not. Many Members – including Korea – apply TRQs. The implementation of TRQs was for many Members the basis for complying with the commitment under Article 4.2 of the WTO Agreement on Agriculture to convert quantitative restrictions into "ordinary customs duties." In addition, Article XIII:5, which specifies that the Article XIII disciplines on quantitative restrictions and quotas apply to TRQs, would not make sense if TRQs were, by their nature, quantitative restrictions or quotas.

30. The same conclusion holds true with regard to Article 5. Nothing in that provision gives its terms a meaning different than they have elsewhere in the WTO Agreement. Indeed, Article 5.2(a) duplicates the text of Article XIII:2(d), which indicates that the terms have the same meaning as used in both articles.

B. The Line Pipe Safeguard Complied With All of the Requirements of Article 5.

31. Under Article 5.1, a Member may apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and facilitate adjustment. The Appellate Body has interpreted this text to require that a safeguard measure be "commensurate" with the goals of Article 5.1. Both of these goals relate to the condition of the domestic industry, since the nature and magnitude of serious injury will determine both the need for adjustment and the extent to which it is necessary to apply a safeguard measure. In short, the condition of the domestic industry sets the benchmark for application of any safeguard measure.

32. This standard applies regardless of whether the competent authorities characterize the domestic industry as subject to serious injury or the threat of serious injury. The factors listed in Article 4.2(a), which the competent authorities consider in evaluating the condition of the domestic industry, are the same for both serious injury and threat of serious injury. Since these factors delineate the condition of the domestic industry, which in turn forms the benchmark for application of a safeguard measure, the application of the safeguard measure will not depend on whether serious injury is current or threatened.

33. Therefore, to ensure that a safeguard measure meets the requirements of Article 5.1, a Member will consider the competent authorities' determination regarding serious injury, the industry's plans and efforts to adjust to import competition, and other factors that it considers relevant.[1]

34. The Safeguards Agreement contains no requirement that a Member explain or "justify" the application of a safeguard measure at the time of application, except in the case of a quantitative restriction described in the second sentence of Article 5.1.[2] Since the U.S. safeguard measure did not take such a form, the United States was under no obligation to justify the measure. Instead, the burden is on Korea to demonstrate that the U.S. safeguard measure was *not* applied "only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment." It has in no sense met this burden.

35. However, if the Panel were to consider whether the line pipe safeguard complied with the requirements of Article 5, the considerations outlined above suggest a multiple step inquiry along the following lines:

(1) a review of the evidence of serious injury or threat of serious injury identified by the competent authorities;

(2) an examination of the nature of the safeguard measure, including its product coverage, form, duration, and level;

(3) an analysis of how the application of the measure addresses the serious injury or threat of serious injury identified by the competent authorities; and

(4) in light of the first three steps, an assessment of whether application of the measure, in its totality, goes beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

36. The U.S. analysis showed that the 19 percent tariff would result, at most, in an increase of $62-64 per short ton in the average unit value of imported line pipe. If domestic producers increased their prices by the same amount, their operating profit margin would increase to $15 to 17 per short ton on average, for an operating income ratio of 3 to 4 percent.[3] That would

---

[1] Paragraph 10 of the U.S. responses to questions from the panel indicates the factors considered by the President.

[2] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999, para. 100.

[3] USITC Report, p. II-28, Table 10.

represent between 3 and 4 percent of total revenues, a level closer, but not equal to, the industry's profitable years before the import surge.[4] However, this scenario would likely leave domestic producers' market share – an important aspect of serious injury – unchanged. Moreover, it is questionable whether the U.S. producers *could* increase their prices by such an amount. Thus, it cannot be said that the United States applied the line pipe safeguard beyond the extent necessary as the measure alone would not be likely to reverse the volume and price effects of increased imports.

C. Article XIII Obligations Regarding Quantitative Restrictions Do Not Apply to TRQs Imposed as Safeguard Measures.

37. In previous submissions, the United States demonstrated that, under customary rules for the interpretation of treaties, Article XIII cannot be interpreted as applicable to safeguard measures taken pursuant to the Safeguards Agreement and Article XIX. Korea has argued that this interpretation deprives Article XIII of its "full force and effect." However, it fails to recognize that it is the customary rules of treaty interpretation, which support the U.S. interpretation, that determine the "full force and effect" of any treaty provision is determined by reference to the customary rules for the interpretation of treaties. As we have explained, it is precisely those rules that compel the conclusion that safeguard measures taken pursuant to the Safeguards Agreement and Article XIX need not satisfy the requirements of Article XIII.

38. Finally, Korea claims that if Article XIII does not apply to safeguard measures, "tariff-rate quotas have escaped multilateral control." This is plainly untrue. The prerequisite that the competent authorities first make a determination of serious injury or threat of serious injury places a significant limitation on the availability of a safeguard TRQ. In addition, the first and last sentences of Article 5.1 apply to safeguard TRQs, as do Articles 7, 8, 9, 11, and 12.

D. Nothing in the Safeguards Agreement Disturbs FTA Parties' Authority Under Article XXIV to Exclude Each Other From the Application of Safeguard Measures.

39. Article XXIV allows FTA parties to decide whether to exclude each other from safeguard measures all of the time, some of the time, or not at all. Under Article XXIV:8, an FTA must eliminate restrictive regulations of commerce – like safeguard measures – on substantially all trade among the parties. Thus, the package of trade liberalizing measures that accompanies formation of an FTA need not eliminate all duties and restrictive regulations of trade. If FTA parties, while retaining some duties and restrictive regulations of commerce, can still achieve the Article XXIV:8 threshold (covering "substantially all trade"), they may retain those regulations. If the elimination of other restrictive regulations covers substantially all trade, the parties *may*

[4] USITC Report, p. II-27, Table 9.

also eliminate safeguard measures.

40. Article 802 of the North American Free Trade Agreement ("NAFTA") requires the parties to exempt each other from safeguard measures under certain circumstances. The Panel asked whether the formation of the NAFTA would have been prevented if the NAFTA parties had not been allowed to introduce this safeguards exemption. It linked this question to the decision of the Appellate Body in *Turkey – Textiles* that "Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions . . . only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed."[5]

41. However, the *Turkey – Textiles* reasoning applied to a measure affecting *external* trade with non-Members of the customs union. Thus, it does not apply to the safeguard exemption, which affects *internal* trade among the parties to the NAFTA, and formed part of the package of trade liberalization that created the FTA.

42. In any event, the *Turkey – Textiles* reasoning demonstrates that Article XXIV invalidates Korea's claims that the NAFTA safeguard exemption was inconsistent with Articles I, XIII, and XIX. Compliance with Article XXIV:8(b) is determined with reference to the entire package of the duties and restrictive regulations of commerce that are eliminated. The safeguard exemption formed part the that package for the formation of the NAFTA. If the GATT 1994 were interpreted to prohibit the NAFTA parties from accepting that obligation, it would prevent adoption of the liberalization package necessary to form an FTA. Thus, by operation of Article XXIV, the safeguard exemption is not inconsistent with Articles I, XIII, and XIX.

[5] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, paras. 46-47 (22 October 1999).